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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-810

CINDY CALDWELL, a minor, by her father and next friend, WILLIAM J. CALDWELL, for the benefit of PATRICIA ROBIN BENSON and RAYMOND W. BENSON,

Petitioners,

vs.

SOUTHEAST TITLE AND INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth Judicial District, was entered May 21, 1973, and is incorporated in the Appendix of the Petition. The Respondent herein thereafter filed a Petition for Certiorari in the Supreme Court of the State of Florida and Petitioner herein filed a Cross-Petition. On April 16, 1975, the Supreme Court of Florida entered an opinion discharging the Writ of Certiorari as to the Petition and Cross-Petition. Petitions for Rehearing and Cross-Petitions for Rehearing were filed and granted and on October 1, 1975, the Supreme Court of Florida rendered an opinion discharging the Writ of Certiorari and adhered to its original Order of April 16, 1975. The two opinions of the Su-

preme Court of Florida have not as yet been reported, but are contained in the Appendix to the Petition herein.

JURISDICTION

Petitioner bases her claim of jurisdiction in the United States Supreme Court on *28 USC 1257(3)*. Respondent's contention is that this Court lacks jurisdiction for the reasons that:

1. There is no substantial Federal question presented;

2. No Federal question was ever raised in any of the Florida Courts which considered the case and no Federal question was passed on by those Courts, and

3. The decisions of the Florida Courts involved may be sustained on an independent ground of State law, the ground upon which they were in fact decided.

These questions will be argued hereinafter.

QUESTIONS PRESENTED

I.

HAVE THE PLAINTIFFS BEEN DEPRIVED OF DUE PROCESS OF LAW IN VIOLATION OF AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION?

II.

HAVE THE PLAINTIFFS BEEN DEPRIVED OF THEIR RIGHTS UNDER AMENDMENT VII OF THE UNITED STATES CONSTITUTION TO A TRIAL BY JURY ON THE ISSUE OF PUNITIVE DAMAGES?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV, SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Petitioner's Statement of the Case is reasonably accurate although it contains references to the testimony which are totally irrelevant to any issue presented to this Court. Respondent will, therefore, re-state the case in order to illustrate its arguments that this Court cannot have jurisdiction.

The then minor Plaintiff, Petitioner herein, Cindy Caldwell, by her father and next friend, for the benefit of Patricia Robin Benson and Raymond W. Benson, filed a Complaint against Defendant, Southeast Title and Insurance Company, Respondent herein, in two counts. Count One alleged negligence and Count Two alleged bad faith on Defendant's part in allegedly refusing to settle within

its policy limits of Fifty Thousand Dollars, a previous personal injury action filed against Cindy Caldwell by the Bensons which had resulted in a Final Judgment against her in the amount of Two Hundred Five Thousand Dollars. Defendant-Respondent filed an Answer which denied bad faith or negligent action on its part and which specifically pointed out that the policy limits were Fifty Thousand Dollars. Plaintiff's Complaint did not seek punitive damages.

At the close of Plaintiff's case, Plaintiff's counsel requested the Court for leave to amend her Complaint to seek punitive damages pursuant to *Rule 1.190(b)* of the *Florida Rules of Civil Procedure*. (TR 503-508) The Motion to Amend was denied. (TR 508-509) *Rule 1.190(b)* of the *Florida Rules* is substantially identical to *Rule 15* of the *Federal Rules of Civil Procedure*.

Plaintiff then requested the Court to allow the Jury to consider awarding punitive damages in light of the evidence of malice and fraud on the Defendant's part without amending the pleadings. (TR 557-558) This Motion was also denied. (TR 558) Plaintiff's Motion was based solely on the Florida Rule and the Transcript will reveal that no Federal question of due process or the deprivation of the right to Jury trial was raised by Plaintiff.

The case went to the Jury which, on August 23, 1972, returned a verdict for Plaintiff in the amount of One Hundred Eighty Thousand Dollars plus interest at the legal rate from August 31, 1970. (R-93) A Final Judgment was entered on the same day. (R-94) After denial of post-trial motions, the Defendant filed its Notice of Appeal (R-102) and Assignments of Error (R-103, 104) to the Fourth District Court of Appeal on October 10, 1972. Plaintiff filed her Cross-Assignments of Error on October

16, 1972. No Federal question was set forth by Plaintiff in the Fourth District Court of Appeal.

On May 21, 1973, the District Court of Appeal entered a simple Per Curiam affirmance of the Trial Court's action. Subsequently, both parties filed Petitions for Writs of Certiorari in the Supreme Court of Florida. Here again, no Federal question was asserted before the Florida Supreme Court. On October 1, 1975, the Supreme Court discharged the Writ it had previously granted. On Page six of the Petition herein, Petitioner asserts that when the Florida Supreme Court discharged the Writ it had previously granted, it ". . . upheld the lower Courts' decisions". Such is not the case. The Florida Supreme Court simply refused to accept jurisdiction, finding no basis for such jurisdiction by reasons of conflict among the various District Courts of Appeal of Florida.

On October 27, 1975, the Respondent, Southeast Title and Insurance Company, delivered its check to counsel for Petitioner herein, being Check No. 146166 dated October 27, 1975, drawn on the First Marine Bank and Trust Company of the Palm Beaches in the amount of Two Hundred Ninety-Seven Thousand Four Hundred Eight and 95/100 Dollars ($297,408.95), payable to Cindy Caldwell, a minor, by her father and next friend, William J. Caldwell, for the benefit of Patricia Robin Benson and Raymond W. Benson, and their attorneys, Farish and Farish. On the same date, October 27, 1975, Petitioner, by F. Randall Slinkman, of Farish and Farish, satisfied the Judgment, said Satisfaction of Judgment being recorded on October 29, 1975, at O. R. Book 2471, Page 1230, of the Public Records of Palm Beach County, Florida. Petition for Certiorari herein was subsequently filed on or about December 4, 1975.

ARGUMENT

Mr. Justice Brennan has concisely stated the criteria upon which this Court can exercise jurisdiction over the highest Court of the State as follows:

> "Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First,* the federal question must be a substantial question. *Second,* the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third,* even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law." Mr. Justice Brennan, *State Court Decisions and The Supreme Court,* 31 Penn. Bar Ass'n Q. 393 at 399 (1960). [Emphasis by the Author]

None of the criteria set forth by Mr. Justice Brennan are present in this case.

I.

There Is No Substantial Federal Question Presented

Plaintiff in the Trial Court did not pray for punitive damages and did not move for leave to amend to ask for punitive damages until the close of her case in chief. The Trial Court under *Rule 1.190(b)* of the *Florida Rules of Civil Procedure* denied the Motion for Leave to Amend and likewise denied Plaintiff's Motion to allow a jury

to consider the question of punitive damages without a formal amendment to the pleadings. *Rule 1.190(b)* of the *Florida Rules* is substantially similar to *Rule 15* of the *Federal Rules of Civil Procedure*, under both of which the test to be applied on appeal is whether the Trial Court abused its discretion. In affirming the Trial Court, the District Court of Appeal for the Fourth District of Florida simply found that the Trial Court did not abuse its discretion. It should be noted that the opinion of the District Court of Appeal, rendered Per Curiam, consists of the single word "Affirmed".

II.

No Federal Question Was Ever Raised in Any of the Florida Courts Which Considered the Case and No Federal Question Was Passed on by Those Courts

This Court has ruled countless times that it is without jurisdiction to consider review of State Court decisions on Federal grounds, where the Federal question involved has never been raised, preserved, or passed upon in the State Courts below. In *Cardinale* v. *State of Louisiana*, 394 U.S. 437 (1969), this Court held that:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438.

The Court went on to elaborate the reasons behind the jurisdictional questions and stated that:

> "In addition to the question of jurisdiction arising under the statute controlling our power to review ... al judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be

inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them." 394 U.S. at 439.

In her Cross-Petition to the Florida Supreme Court Plaintiff stated her points involved on the Cross-Petition as follows:

"POINT I. DID THE DISTRICT COURT ERR IN AFFIRMING THE TRIAL COURT'S ORDER DENYING THE REQUESTED AMENDMENT TO THE COMPLAINT?

POINT II. DID THE DISTRICT COURT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL TO ALLOW THE JURY THE OPPORTUNITY TO CONSIDER THE WILLFUL AND WANTON NATURE OF THE DEFENDANT'S CONDUCT?"

There is not so much as a suggestion of a Federal question in Plaintiff's brief before the Supreme Court of Florida. No constitutional provision is even mentioned in her brief, nor are any cases cited on the question of deprivation of any federally protected right. The brief is directly solely at the question whether the Trial Court, and the District Court in affirming, abused their discretion in deny-

ing the requested amendment to the Complaint and in denying the request to submit the question of punitive damages to the Jury.

The Complaint in the Trial Court, which appears as pages 1 through 17 of the Record before this Court, simply alleges negligence and/or bad faith on the part of Defendant in failing or refusing to settle the previous litigation within the Defendant's policy limits. The words "malice" or "wilful or wanton misconduct" or similar words usually used in connection with a claim for punitive damages do not appear in the Complaint and punitive damages are not prayed for. This Court in countless decisions has held that a Federal question, when not presented prior to the decision by the Court of last resort of the State, comes too late. E.g., *Cardinale* v. *Louisiana* (supra); *Bolln* v. *Nebraska*, 176 U.S. 83 (1900); *Sayward* v. *Denny*, 158 U.S. 180 (1895); *Miller* v. *Texas*, 153 U.S. 535 (1894).

III.

The Decisions of the Florida Courts Involved May Be Sustained on an Independent Ground of State Law, the Ground Upon Which They Were in Fact Decided

The question presented by Plaintiff on appeal to the Fourth District Court of Appeal of Florida and on her Cross-Petition to the Florida Supreme Court, is the simple question under State law of whether the Trial Court abused its discretion by refusing to allow an amendment to the Complaint at the close of Plaintiff's case. The Florida Rule, *Rule 1.190*(b), is substantially similar to *Federal Rule 15*, under both of which, although amendments are to be liberally allowed as justice requires, the test on appeal is whether the Trial Court abused its discretion. The District Court of Appeal's simple affirmance is no more and no less than a holding that the Trial Court

did not abuse its discretion. The decision of the Florida Supreme Court is similar to denial of certiorari by this Court and simply means that the Florida Supreme Court declined to assume jurisdiction of the case. Even had Federal questions been raised, which they were not, the Florida decisions can be easily sustained on the purely State procedural ground that Plaintiff's Motion for Leave to Amend came too late and that the Trial Court did not abuse its discretion in denying that Motion.

IV.

Petitioner Has Accepted Payment in Full of the Judgment in Her Favor, Including Interest and Attorneys Fees, and Has Satisfied the Judgment of Record

On October 27, 1975, the Respondent delivered its check No. 146166 in the amount of $297,408.95, to counsel for Petitioner herein. The check was payable to Cindy Caldwell, a minor, by her father and next friend, William J. Caldwell, for the benefit of Patricia Robin Benson and Raymond W. Benson, and their attorneys, Farish and Farish. The check represented payment for the judgment in the original amount of $180,000.00, plus statutory interest on that sum and an attorneys fee for Petitioner's counsel in the amount of $50,000.00. Petitioner and Petitioner's counsel accepted and negotiated the check and have satisfied the judgment, said Satisfaction of Judgment being recorded on October 29, 1975, at O. R. Book 2471, Page 1230, of the Public Records of Palm Beach County, Florida.

In an annotation found at 169 ALR, beginning at page 985, it is stated that:

> "As a general rule, where a judgment is entered awarding costs to a party, even though the remainder

> of the judgment is against him, if he or his attorney accepts payment of the costs, he waives his right to review on appeal or error." 169 ALR at 1047.

The broad rule followed in *Ballinger* v. *Connecticut Mut. L. Ins. Co.*, 118 Iowa 27 (1902), 91 NW 767, is that when a party accepts payment of a judgment, any portion of which is in dispute, he waives all errors. In the case at bar the judgment has been paid and has been satisfied of record and there is nothing in the Satisfaction of Judgment to indicate any reservation of rights, as there was in *Cruz* v. *Pacific American Ins. Corp.*, (1964, Ninth Cir.) 337 F. 2d 746. In *Cruz*, the satisfaction was interlined in handwriting with the following:

> ". . . said judgment not including 12% penalty or attorneys fees, both of which having been denied by the court. . ."

The general rule is that where a party accepts a part of the judgment, all of which is in dispute, he waives all rights to appeal.

Under Florida law a finding of compensatory damages is essential to an award of punitive damages. As stated at *9A Fla. Jur., Damages, Section 121*:

> "This result follows not necessarily because compensatory damages are a prerequisite to an award of exemplary damages, but rather, because compensatory damages are an essential element of the cause of action which the complainant is obliged to prove in order to sustain an award of exemplary damages."

It follows that in the case at bar any re-trial on the issue of punitive damages would necessarily involve the same proof which established compensatory damages, and any re-trial must be on the entire case and not merely

on the question of punitive damages, which, under Florida law, cannot stand alone.

As stated in *McMullen* v. *Ft. Pierce Financing & Construction Co.*, (Sup. Ct. Fla. 1933) 146 So. 567, in which the appellant had accepted the fruits of the judgment in his favor, and then appealed on the grounds that his damages were insufficient:

> "It is perfectly plain, therefore, that appellant could not avail himself of the decree in his favor by accepting the fruits thereof, and then appeal from such decree on the ground that the chancellor had not awarded him as large an amount as he deemed himself entitled to. From a decree of this sort, McMullen could only have appealed by refusing to accept the fruits of the decree. He could not accept such fruits and also appeal. He could not eat his cake and have it too. He could not seek to enforce the decree in his favor and then seek to have it reversed." 146 So. at 569.

Petitioner herein seeks to have her cake and eat it too.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent in Opposition has been furnished to Mr. Joseph D. Farish, Jr., Farish and Farish, Denco Building, 316 First Street, West Palm Beach, Florida 33402, Attorneys for Petitioners; and to Edna L. Caruso, Howell, Kirby, Montgomery, D'Aiuto and Dean, 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33402, by mail, this 2nd day of January, A. D. 1976.

JULIUS F. PARKER, JR., Attorney